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No. 81-1843

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ILLINOIS, PETITIONER

v.

JOHN ANDREAS

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

Whether law enforcement officers were required to obtain a search warrant before reopening a container that had been delivered under controlled conditions following discovery of marijuana in the container during the course of a lawful customs inspection.

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INTEREST OF THE UNITED STATES

This case presents an important question concerning the application of the Fourth Amendment warrant requirement to situations in which contraband is discovered in a container during a lawful search and thereafter the container is resealed and delivered to the addressee under controlled conditions and is then retrieved and reopened by law enforcement officers. Such situations arise with some frequency and often involve federal law enforcement officers. In the present case agents of the federal Drug Enforcement Administration participated in testing contraband found in a container and delivering it under controlled conditions to respondent, who was the consignee of the container. In a typical case a federal customs inspector or a private party (e.g., an airline employee) who detects illicit drugs concealed in a package will contact federal drug enforcement officers. Those officers then arrange for a controlled de-

livery in an attempt to identify the individuals involved in a narcotics transaction. Suspects identified through the controlled delivery frequently are charged with violations of federal statutes. Thus, the Court's decision in this case may have a significant impact on federal investigations and prosecutions.

STATEMENT

Respondent was charged with possession of controlled substances, in violation of Ill. Rev. Stat. ch. 56½, §§ 704(e) and 705(e) (1979). Prior to trial in the Circuit Court of Cook County, Illinois, respondent filed a motion to suppress evidence of marijuana that had been found in a container delivered to him under controlled conditions. Although the container previously had been opened and the marijuana discovered in the course of a lawful customs inspection, respondent argued that law enforcement officers were required to obtain a warrant before reopening the container after the controlled delivery and arrest of respondent. Following a hearing, the trial court granted the motion to suppress the evidence (Pet. App. 1b-2b). The Appellate Court of Illinois, First Judicial District, affirmed (*id.* at 1a-12a). The Illinois Supreme Court denied a petition for leave to appeal (*id.* at 1c).

1. The evidence presented at the suppression hearing is summarized in the opinion of the court below (Pet. App. 1a-3a). That evidence showed that on February 21, 1979, federal customs inspector Ronald Drozek was working at the Lufthansa cargo facility at O'Hare International Airport. In the course of his work, Drozek inspected a sheet metal container that had been shipped from Calcutta, India, to respondent at a Chicago address. The container was approximately four feet square and eighteen inches thick and was secured by two locks. Drozek used keys attached

to the airline documents to open the container. Inside he found a wooden table top approximately three feet in diameter. Drozek drilled into the table top and discovered that it was filled with a substance that field tested positively as marijuana. Drozek then contacted federal Drug Enforcement Administration agents.

Later that day DEA agent Kenneth Labek saw the table top and tested the substance that it contained; the test confirmed that the substance was marijuana. Customs agents later repackaged the table top outside Labek's presence. The following day Labek returned and received the repackaged container from customs officials. He placed the container in a van, which he drove to respondent's Chicago address. Then Labek and a local police officer, Wayne Lipsek, posing as delivery men, advised security personnel at respondent's apartment that they had a package for him. After a few minutes respondent appeared and identified himself. When Labek told respondent that he and Lipsek were there to deliver the container, respondent replied, "Good. Where is it?" Respondent observed Labek and Lipsek remove the container from the van. When Lipsek commented that the container was quite heavy, respondent replied that it was not that heavy; that he had packaged it himself; and that it contained only a table (Tr. 30).[1] Labek and Lipsek carried the container to respondent's second floor apartment and, at his direction, left it in the hallway outside his door. Labek and Lipsek then walked to the end of the hall and turned a corner. From that position Labek looked back and saw respondent pull the container into his apartment. Lipsek left to obtain a search warrant for the container and apart-

[1] "Tr." refers to the transcript of the suppression hearing.

ment from a state judge (Tr. 38), while Labek remained inside the building. Approximately five minutes after respondent had pulled the container into his apartment, Labek observed him come out of the apartment, walk to a window at the end of a hallway, look outside in both directions and downward, and then return to the apartment. Labek was unable to see inside respondent's apartment or to keep respondent's door under continuous surveillance.

Around 30 to 45 minutes after the delivery, Labek saw respondent and the container in the hallway. Police then arrested respondent and notified Lipsek by radio that a warrant no longer was needed. Lipsek returned to the building, and he and Labek placed the container in the van and drove it to a police station (Tr. 18). Later in the day, in Lipsek's presence, the container was reopened, the table broken apart, and the marijuana removed. The officers who reopened the container did not obtain a warrant to do so.

2. The Illinois appellate court ruled that the warrantless reopening of the container was unlawful (Pet. App. 1a-12a).[2] Relying primarily upon *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), and *United States* v. *Chadwick*, 433 U.S. 1 (1977), the court concluded that respondent had a reasonable expectation of privacy with respect to the contents of the container (Pet. App. 4a-5a). It rejected the State's contention that because the contents of the package were lawfully discovered, no warrant was necessary to reopen the container after a controlled delivery during which law enforcement officers had never lost custody over the container. The court distinguished cases in which courts had approved warrantless reopenings of

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[2] Respondent apparently did not challenge the initial search of the container by the customs inspector.

containers retrieved after controlled deliveries on the ground that in the cases cited the contraband had been marked and the package had been delivered under close surveillance (*id.* at 7a-8a). The court concluded that in this case law enforcement officers were not "absolutely sure" of the contents of the container, since Labek had not been present when the container was resealed after the customs inspection, Lipsek knew of the contents only by hearsay, and neither had observed the container during the period it was inside respondent's apartment (*id.* at 8a).[3]

SUMMARY OF ARGUMENT

1. The "controlled delivery" technique, used to deliver the container to respondent in this case, is an important law enforcement tool designed to identify persons responsible for movement of contraband and to determine whether those persons have knowledge of the illicit contents of a container. The court below held that officers should have obtained a warrant prior to reopening of a container following a lawful customs search and controlled delivery. However, federal courts of appeals and most state courts that have considered the question have concluded correctly that law enforcement officers need not obtain a warrant to reopen a container that has been searched lawfully and then delivered under controlled conditions. There is little point in requiring officers to obtain a warrant in such cases, since reopening of a container following a controlled delivery constitutes no greater invasion of the recipient's privacy than has occurred previously in the course of the lawful

[3] The court also rejected the State's claims (not renewed here) that the container was properly searched incident to respondent's arrest and that respondent had abandoned the container in the hallway (Pet. App. 9a-12a).

search. The reliance of the court below on *United States* v. *Chadwick*, 433 U.S. 1 (1977), and *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), is misplaced, since those cases did not involve an earlier lawful search that served to dispel any reasonable expectation of privacy. The search of the container in this case also was lawful on the ground that it constituted an extended border search for which no warrant was required.

2. The court below concluded that a warrant should have been obtained for reopening of the container addressed to respondent because there was a break in surveillance of the container by law enforcement officers during the controlled delivery, so that the officers could not be "absolutely sure" that the contents of the container remained unchanged. This standard of absolute certainty is inappropriate. The relevant competing interests are best served by a holding that a warrant is not required to reopen a container following a controlled delivery provided there is no substantial likelihood at the time of reopening that the contents of the container are different from what they were at the time of the earlier search. The collective knowledge of different law enforcement officers who were involved at various stages of the controlled delivery in this case is sufficient to support a conclusion that the contents of the container remained intact. In addition, in the particular circumstances of this case, there was no substantial likelihood that the contents of the container changed during the period of 30 to 45 minutes when the container was inside respondent's apartment. Thus, the court below erred in suppressing the evidence of the marijuana retrieved from the container on the ground that no warrant had been obtained before the container was reopened.

ARGUMENT

LAW ENFORCEMENT OFFICERS WERE NOT REQUIRED TO OBTAIN A SEARCH WARRANT BEFORE REOPENING A CONTAINER THAT HAD BEEN DELIVERED UNDER CONTROLLED CONDITIONS FOLLOWING DISCOVERY OF MARIJUANA IN THE CONTAINER DURING THE COURSE OF A LAWFUL CUSTOMS SEARCH

A. The Fourth Amendment does not generally require a search warrant in connection with reopening of a container that previously was the subject of a lawful search and thereafter was delivered under controlled conditions

1. The delivery of a metal shipping container to respondent's apartment constituted a "controlled delivery," i.e., a delivery supervised by law enforcement officers. The controlled delivery technique is frequently employed after contraband has been discovered in the course of a lawful search of a container in transit.[4] That lawful search may be a customs inspection, as in this case, or a private search conducted by a common carrier employee, who then reports the discovery of contraband to law enforcement

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[4] For examples of recent cases in which controlled deliveries have occurred, see *United States* v. *Modica*, 663 F.2d 1173 (2d Cir. 1981), cert. denied, No. 81-1630 (May 24, 1982); *United States* v. *Sheikh*, 654 F.2d 1057 (5th Cir. 1981), cert. denied, No. 81-5828 (Mar. 1, 1982); *United States* v. *McGreevy*, 652 F.2d 849 (9th Cir. 1981); *United States* v. *Hackett*, 638 F.2d 1179 (9th Cir. 1980), cert. denied, 450 U.S. 1001 (1981); *United States* v. *Richards*, 638 F.2d 765 (5th Cir.), cert. denied, 454 U.S. 1097 (1981); *United States* v. *Andrews*, 618 F.2d 646 (10th Cir.), cert. denied, 449 U.S. 824 (1980); *United States* v. *Bulgier*, 618 F.2d 472 (7th Cir.), cert. denied, 449 U.S. 843 (1980); *United States* v. *Edwards*, 602 F.2d 458 (1st Cir. 1979); *United States* v. *Barone*, 584 F.2d 118 (6th Cir. 1978), cert. denied, 439 U.S. 1115 (1979).

authorities. Law enforcement officers use a controlled delivery as a way to identify the person or persons responsible for movement of the contraband and to ascertain whether they have knowledge of the illicit contents of the container. Such deliveries obviously serve important law enforcement functions. In *United States* v. *Bulgier*, 618 F.2d 472, 476, cert. denied, 449 U.S. 843 (1980), the Seventh Circuit described the use of controlled deliveries:

> Controlled deliveries of contraband apparently serve a useful function in law enforcement. They most ordinarily occur when a carrier, usually an airline, unexpectedly discovers what seems to be contraband while inspecting luggage to learn the identity of its owner, or when the contraband falls out of a broken or damaged piece of luggage, or when the carrier exercises its inspection privilege because some suspicious circumstance has caused it concern that it may unwittingly be transporting contraband. Frequently, after such a discovery, law enforcement agents restore the contraband to its container, then close or reseal the container, and authorize the carrier to deliver the container to its owner. When the owner appears to take delivery he is arrested and the container with the contraband is seized and then searched a second time for the contraband known to be there.

The federal courts and most state courts that have considered the question have concluded that law enforcement officers need not obtain a search warrant in order to reopen a container that has been searched lawfully and then delivered under controlled conditions. These courts generally have reasoned that seizure occurred at the time of the initial lawful search, that the container remained within official control

throughout the course of the controlled delivery, and that reopening of the container constituted merely a reassertion of control over what previously had been seized. See, e.g., *United States* v. *Bulgier*, *supra*, 618 F.2d at 475-478; *United States* v. *Andrews*, 618 F.2d 646, 650-654 (10th Cir.), cert. denied, 449 U.S. 824 (1980); *United States* v. *Ford*, 525 F.2d 1308, 1312-1313 (10th Cir. 1975); *United States* v. *DeBerry*, 487 F.2d 448, 450-451 (2d Cir. 1973). See also cases listed at 2 W. LaFave, *Search and Seizure* § 5.5(e), at 87 n.90 (Pocket Part 1982). But see *People* v. *Riegler*, 111 Cal. App. 3d 580, 168 Cal. Rptr. 816 (1980), cert. granted, judgment vacated and remanded, 453 U.S. 919, on remand, 127 Cal. App. 3d 317, 179 Cal. Rptr. 530 (1981), petition for cert. pending, No. 81-1916. The courts have concluded correctly that official control of a container continues even after delivery is made, so long as law enforcement officers continue their surveillance.

There is little point in requiring law enforcement officers to obtain a warrant before reopening a container following a lawful search and controlled delivery. Any invasion of the recipient's privacy interest in the contents of the container obviously occurred in the course of the initial lawful search that resulted in the discovery of contraband. Given the fact of the initial search, the subsequent reopening of the container following a controlled delivery constitutes no greater intrusion into privacy than what already has occurred. Since there is no incremental invasion of the recipient's privacy, there is no reason to require a warrant. See, e.g., *United States* v. *Brand*, 556 F.2d 1312, 1317 (5th Cir. 1977), cert. denied, 434 U.S. 1063 (1978) (once a citizen's Fourth Amendment privacy interest has been invaded legally by an official

of the State, the citizen has lost his reasonable expectation of privacy to the extent of the invasion). This is in substantial part the justification for the well recognized plain view exception to the warrant requirement. See *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467-468 (1971).

Indeed, a majority of this Court has indicated that no warrant is required for a second search by law enforcement officers that is no more intrusive than an earlier private search. *Walter* v. *United States*, 447 U.S. 649, 656, 659 n.14 (1980) (Stevens, J.); *id.* at 661 (White, J.); *id.* at 663, 665 (Blackmun, J., dissenting). Moreover, since the officers already know (and in fact have seen) the contents of the container, a warrant requirement would be a needless formality.[8] As Professor LaFave suggests, the approach of the controlled delivery cases is a sensible one, "because the earlier viewing of the contents (which could not have changed in the interim) makes the probable cause so certain as to be beyond question, thus obviating the need for a pre-search judicial assessment of whether the police are entitled to open the container." 2 LaFave, *supra*, § 5.5(e) at 90 (footnotes omitted).

Reopening of a container without a warrant following a controlled delivery is fully consistent with the Fourth Amendment standards set out by this Court. In *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979) (footnote omitted), the Court stated that the

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[8] Since there is nothing for law enforcement officers to "discover" when, following a controlled delivery, they reopen a container whose contents they have already seen, it is unlikely that the reopening constitutes a "search" at all. See *United States* v. *Richards*, *supra*, 638 F.2d at 773-774 (Gee, J., concurring).

reasonableness of an action is judged "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." See also *Brown* v. *Texas*, 443 U.S. 47, 50-51 (1979); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 555 (1976). On the one hand, reopening of a container following a controlled delivery results in no incremental intrusion on privacy beyond that which occurred in the course of the earlier lawful search. On the other hand, requiring a warrant in such a case would impose a needless burden on law enforcement operations and would weaken the protections of the warrant procedure by trivializing it.[6] The balance of interests weighs heavily against a warrant requirement in such situations.

The court below relied on *United States* v. *Chadwick*, 433 U.S. 1 (1977), and *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), for the proposition that respondent had an expectation of privacy in the container delivered to him and that a warrant therefore was required. But both *Chadwick* and *Sanders* involved a materially different situation from that in the present case. While the officers in those cases had probable cause to conduct a search, there had been no governmental inspection of the interior of Chadwick's trunk or Sanders' suitcase prior to the challenged warrantless searches. Thus, those defendants retained a reasonable expectation of privacy protected

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[6] Of course, it may be difficult to anticipate in advance what sort of warrant would be appropriate in a controlled delivery situation. See, e.g., *People* v. *Riegler*, *supra*, in which a warrant was obtained for search of the residence to which packages were delivered, but the packages eventually were retrieved from a vehicle that had been driven away from the residence approximately half an hour after the delivery.

by the Fourth Amendment. Here, the lawful customs inspection in which the marijuana was discovered served to dispel any legitimate privacy interest respondent otherwise might have had.[7] Accordingly, *Chadwick* and *Sanders* do not govern the present case. See *United States* v. *Bulgier*, *supra*; *United States* v. *Andrews*, *supra*.

2. Reopening of the container following controlled delivery to respondent also can be justified on the ground that it constituted an extended border search. Customs officers have broad authority to inspect packages from abroad without either a warrant or probable cause. *United States* v. *Ramsey*, 431 U.S. 606, 616-619 (1977).[8] In this case, the container arrived by air from India and was subject to a customs search at O'Hare International Airport, the "functional equivalent" of the border. See *id.* at 622; *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 273

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[7] A high level of probable cause normally would not excuse the failure to obtain a warrant. However, this Court suggested in *Sanders* that some types of containers "by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance." 442 U.S. at 764-765 n.13. Under this analysis the contents of a container that previously has been viewed by law enforcement officers in the course of a lawful search need not even be inferred, so that the container is a fortiori not entitled to Fourth Amendment protection so long as its contents are known to remain the same.

[8] The basis for the border search exception to the warrant requirement is the right of the sovereign to protect itself from the introduction into its borders of individuals or items whose mere presence is illegal. See *Torres* v. *Puerto Rico*, 442 U.S. 465, 472-473 (1979); *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 272 (1973); *Carroll* v. *United States*, 267 U.S. 132, 154 (1925).

(1973). The subsequent reopening of the container at the police station can be characterized as an extended border search.[9] Under the extended border search doctrine, courts have recognized that border searches need not always take place at the border itself or the functional equivalent of the border, but for investigative reasons may be conducted at some distance from the border. As in the case of a normal border search, neither probable cause nor a warrant is required. The courts of appeals have generally held that an extended border search may occur when it is reasonably certain that the object searched has crossed the border and has remained unchanged since it crossed the border. See, e.g., *United States* v. *Richards*, 638 F.2d 765 (5th Cir.), cert. denied, 454 U.S. 1097 (1981); *United States* v. *Bilir*, 592 F.2d 735, 741 (4th Cir. 1979); *United States* v. *Fogelman*, 586 F.2d 337, 344 (5th Cir. 1978). Like the controlled delivery technique, the extended border search plays an important role in law enforcement efforts to identify "higher-ups" in narcotics operations. See *United States* v. *Martinez*, 481 F.2d 214, 218 (5th Cir. 1973), cert. denied, 415 U.S. 931 (1974).

The present case presents facts similar to those in *United States* v. *Richards*, *supra*, in which the Fifth Circuit applied the extended border search doctrine. In *Richards* a customs inspector in New York had examined a package mailed from Thailand when it entered the United States. The inspector discovered contraband and contacted DEA agents, who arranged for the package to be resealed and sent by locked pouch to its destination. Richards picked up the package at the post office and was arrested

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[9] The record indicates that customs agents were present when the container was reopened. See Tr. 36.

as he was about to drive away. The court held that law enforcement officers were not required to obtain a warrant before reopening the package after Richards' arrest, since the reopening constituted an extended border search.

B. The break in surveillance by law enforcement officers during the controlled delivery in this case did not justify a requirement that the officers obtain a warrant before reopening the container

The court below appears to have accepted the proposition that a warrant would not be required to reopen a container in most controlled delivery cases.[10] However, it concluded that the controlled delivery cases did not govern this case because the law enforcement officers here were not "absolutely sure" of the contents of the container when they reopened it (Pet. App. 8a). In support of its conclusion, the court cited the facts that Labek, the DEA agent, had not been present when customs officials replaced the table top and resealed the container; that Lipsek, the local police officer, knew of the container's contents only through hearsay; and that the contents of the container might have been altered while the container was inside respondent's apartment.

The court erred in concluding that a warrant is required to reopen a container following a controlled delivery unless law enforcement officers are "absolutely sure" that the contents remain the same as

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[10] The court stated (Pet. App. 6a) (citations omitted):

> Where there is a prior legal search of property, a valid seizure by police officers predicated upon that search, and a delivery to the addressee made under the direction and control of police, a subsequent search which occurs at the termination point of the delivery may be conducted without a warrant as it constitutes a reassertion of possession and is deemed part of the first search and seizure.

they were at the time of the earlier lawful opening. Such an extreme standard is inappropriate. The practical features of a controlled delivery may make it impossible to meet the sort of absolute certainty test the court applied here. A controlled delivery often involves transfer of an object from one set of law enforcement officers to another, sometimes to a different part of the country. Even if a controlled delivery takes place within a single geographical area, a container may be in the custody of customs agents, DEA agents, local police, or other types of officers at various stages. Once a delivery is made, it often will not be practicable to maintain surveillance of the container at every moment, since the recipient may move the container and may take it into an automobile or building where it is temporarily out of sight of law enforcement officers. Indeed, the purpose of the controlled delivery procedure would in many circumstances be defeated if the recipient of the package were not permitted to take custody of it for at least a brief period of time. In most cases, however, any gaps in surveillance will be relatively short, and it will be most unlikely that there has been any change in the contents of a container during these periods, either because of the brevity of the interruption of surveillance or because other circumstances indicate that it is improbable that there has been a change.[11] Thus, a lesser stan-

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[11] In the extended border search cases the courts have found a reasonable certainty that an object remained unchanged after it crossed the border, despite gaps in surveillance. See, e.g., *United States* v. *Bilir*, *supra*, 592 F.2d at 738, 741 (5½-hour period when suspects were inside hotel room); *United States* v. *Martinez*, 481 F.2d 214 (5th Cir. 1973), cert. denied, 415 U.S. 931 (1974) (35-minute gap in surveillance of truck carrying contraband).

dard than absolute certainty seems appropriate. We suggest that the relevant competing interests are best accommodated by a holding that a warrant is not required to reopen a container following a controlled delivery provided that there is no substantial likelihood at the time of reopening that the contents of the container are different from what they were at the time of the earlier search.

The court below was clearly wrong in suggesting that the same law enforcement officer must be present at every stage of a controlled delivery in order to avoid the need to obtain a warrant for reopening. The courts have recognized that when law enforcement officers are working together, it is proper to look to their collective knowledge, rather than solely to the knowledge of any particular individual, to see, for example, whether there was probable cause for a search or arrest. See, e.g., *Whiteley* v. *Warden*, 401 U.S. 560, 568 (1971); *United States* v. *Kreimes*, 649 F.2d 1185, 1189 (5th Cir. 1981); *United States* v. *Wright*, 641 F.2d 602, 606 (8th Cir.), cert. denied, 451 U.S. 1021 (1981); *United States* v. *Bernard*, 623 F.2d 551, 560-561 (9th Cir. 1979); *United States* v. *Laughman*, 618 F.2d 1067 (4th Cir.), cert. denied, 447 U.S. 925 (1980); *United States* v. *Clark*, 559 F.2d 420, 424 (5th Cir.), cert. denied, 434 U.S. 969 (1977); *United States* v. *Woods*, 544 F.2d 242, 259-260 (6th Cir. 1976), cert. denied, 429 U.S. 1062, 430 U.S. 969, 431 U.S. 954 (1977). See also *United States* v. *Ventresca*, 380 U.S. 102, 111 (1965). Under the "collective knowledge" doctrine, the knowledge of successive law enforcement officers at various stages of the operation should be sufficient to support a finding that the contents of the container remained intact. Here both the customs agent, Drozek, and the DEA agent, Labek, viewed the contents of the con-

tainer when it was initially opened. It is entirely unreasonable to hypothesize that customs officials might not have repackaged and resealed the container in accordance with the plan for controlled delivery.[12] Labek communicated the information about the contents of the container to local police, including Lipsek, who was present during the actual delivery and again at the reopening of the container. The collective knowledge of these officials was clearly sufficient to support the conclusion that the contents of the container remained intact during its repackaging and delivery.

The court below also was concerned with the gap in surveillance during the period of 30 to 45 minutes when the container was out of view inside respondent's apartment. Such a gap does create a close question in this case, and in some cases might lead to the conclusion that there was a substantial likelihood that the contents of the container had changed.[13] In the particular circumstances of this case, however, we believe that there was no substan-

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[12] Certainly an affidavit for a warrant in this case would not have failed to make out probable cause, or even had its force in the least diminished, for lack of an averment from the customs agent that the container was repackaged as planned.

[13] For example, if the container were a tote bag or a briefcase that had been delivered to an individual's home, it might be logical to conclude that the container could have been unpacked and refilled with different items in the course of a period of 30 to 45 minutes. In the case of a specialized shipping container, such as the one in this case, it might be reasonable to assume that the contents would remain unchanged during a short period, but unreasonable to assume that they remained intact a week after delivery unless there were some way to determine that the container had not been opened during that time.

tial likelihood that the contents of the container changed during the period the container was inside respondent's apartment, so that it would be reasonable to permit a warrantless reopening.[14] Although the officers were unable to observe the container directly for a period of 30 to 45 minutes, Labek observed respondent in the hallway checking a window, apparently to see whether the "coast was clear," suggesting that respondent intended to transport the contraband to another location. When Labek again saw the container, respondent had brought it into the hallway, confirming that he was planning to take it away. After respondent had been arrested, Labek and Lipsek lifted the container into the van (Tr. 18), enabling them to observe that it was the same weight as when they had carried it up to respondent's apartment. Given the size and specialized nature of the container, which apparently was designed for shipping large items, it was most unlikely that

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[14] Indeed, the circumstances of this case suggest that petitioner also could meet the "reasonable certainty" test that has been applied in some extended border search cases. See, e.g., *United States* v. *Richards, supra,* 638 F.2d at 773 (suggesting that warrant will not be required when it appears with reasonable certainty that contents of mail have not been altered since it entered the United States); *United States* v. *Garcia,* 672 F.2d 1349 (11th Cir. 1982); *United States* v. *Driscoll,* 632 F.2d 737, 739 (9th Cir. 1980), citing *United States* v. *Potter,* 552 F.2d 901, 907 (9th Cir. 1977). The Fifth Circuit has described the reasonable certainty standard as "something more than probable cause, but less than beyond a reasonable doubt." *United States* v. *Niver,* 689 F.2d 520, 526 (1982). In many extended border search cases there has been no earlier search, so that it is not known whether contraband is being carried. A lesser standard than that of reasonable certainty seems appropriate in cases in which the existence of contraband has been confirmed as the result of an earlier lawful search.

respondent would have removed the table top and repacked the container with some object of similar weight. In addition, given the need to drill into the table top to retrieve the substance within, it was virtually certain that respondent could not have altered the contents of the table top itself during the time it was inside his apartment.[15]

Given the absence of any substantial likelihood that the contents of the container had changed by the time the law enforcement officers reclaimed it, reopening of the container following respondent's arrest was unlikely to entail any incremental invasion of privacy beyond what had occurred during the lawful customs search.[16] Under these circumstances it would have been pointless to require law enforcement officers to obtain a warrant before reopening the container in order to retrieve what they knew was there.[17] The

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[15] The court below also noted that the contraband had not been marked (Pet. App. 7a-8a). Under the circumstances of this case, in which the contraband was located inside a table top, marking would have been an unnecessary measure.

[16] Moreover, it can hardly be said that respondent had any reasonable expectation of privacy in the contents of the package following his arrest. Since customs inspectors have the right to examine any package mailed from abroad to the United States, a consignee of such a package must realize that its contents may have been examined. Respondent presumably was told, or realized, at the time of his arrest that the law enforcement officers knew the contents of the container and the table top. Compare *United States* v. *Andrews*, *supra*, 618 F.2d at 652.

[17] It might be argued that in cases in which there has been some break in surveillance, there is a role for a neutral magistrate to play, that is, to determine whether there is a substantial likelihood that the contents of the container have been altered, and, if so, whether there is nevertheless justifi-

court below erred in suppressing the evidence of the contents of the container on the ground that no such warrant had been obtained.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted.

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cation for examination of its contents. However, we do not believe this is so in a case such as the present one. At least in cases in which the break in surveillance has been brief and in which a limited number of people have had access to the container, a search would be reasonable whether or not the contents had changed. If the contents had not changed, there would be no incremental invasion of privacy beyond the earlier lawful invasion, as we have suggested. If, on the other hand, the contents had changed, this would be highly relevant evidence that a consignee had received contraband knowingly. In either case, a magistrate presumably would authorize issuance of a warrant. Thus, there appears to be little meaningful role for a magistrate in a case such as this one.

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